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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. KUHN,

Petitioner,

v.

GLORIA KUHN,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Illinois, by statute, may constitutionally discriminate against non-married persons whose children are of college age to require said non-married persons to make non-voluntary financial contributions toward their adult children's college educational expenses when no such obligation is imposed on similarly situated married persons.

2. Whether the State of Illinois, by statute, may constitutionally compel non-married persons whose children are of college age to make non-voluntary financial contributions toward their adult children's college educational expenses when said non-married persons have otherwise chosen not to make voluntary financial contributions.

3. Whether marital status is an illegitimate basis on which to build a legislative sponsored program of discriminatory treatment.

4. Whether compulsory financial support for adult children's college endeavors violates a parent's fundamental privacy rights.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Michael J. Kuhn, the petitioner herein, prays that a writ of certiorari issue to review an order of the Supreme Court of Illinois entered on February 5, 1992 wherein said Court refused to consider review of an opinion filed on October 21, 1991 by the Illinois Appellate Court, Second District.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, Second District which was sought to be reviewed in the Supreme Court of Illinois is reported at 221 Ill.App.3d 1, 581 N.E.2d 380 and printed in the Appendix on pages 1a-5a.

The order entered in the Supreme Court of Illinois on February 5, 1992 is printed in the Appendix hereto on page 7a. The trial court order and memorandum opinion filed in the Circuit Court of the Nineteenth Judicial Circuit are not reported, but are printed in the Appendix hereto on pages 8a-11a.

JURISDICTION

The opinion of the Illinois Appellate Court, Second District was filed on October 21, 1991. A timely Petition for Certificate of Importance was filed with the Illinois Appellate Court, Second District on November 15, 1991, and said Court denied said petition in an order entered on December 4, 1991. A timely Petition for Leave to Appeal to the Supreme Court of Illinois was filed on November 25, 1991. An order denying the Petition for Leave to Appeal was entered by the Supreme Court of Illinois on February 5, 1992.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257 to review the constitutionality of an Illinois statute which is challenged as violating rights guaranteed by the United States Constitution. As such, 28 U.S.C. § 2403(b) may be applicable to this proceeding and Petitioner shall serve appropriate notice upon the Attorney General of Illinois.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amend XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Revised Statutes, Chapter 40, Section 513

§ 513. Support for Non-minor Children and Educational Expenses. The Court may award sums of money out of the property and income of either or both parties for the support of the child or children of the parties who have attained majority and are not otherwise emancipated only when such child is mentally or physically disabled; and the application therefor may be made before or after such child has attained majority age. The Court also may make such provision for the education and maintenance of the child or children, whether of minor or majority age, out of the property and income of either or both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age. The authority under this Section to make provision for education and maintenance extends not only to periods of college education or professional or other training after graduation from high school but also to any period during which a child of the parties is still attending high school, even though he or she attained the age of 18. In making such awards, the court shall consider all relevant factors which shall appear reasonable and necessary, including:

(a) The financial resources of both parents.

(b) The standard of living the child would have enjoyed had the marriage not been dissolved.

(c) The financial resources of the child.

STATEMENT OF THE CASE

Gloria Kuhn brought a Petition in the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, in May, 1990 seeking college expense contributions from Michael J. Kuhn pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act. In response thereto, Michael J. Kuhn filed a Petition for Declaratory Relief seeking to challenge the constitutionality of Section 513. The Petition was amended by leave of Court on August 16, 1990.

The crux of the argument made by Michael J. Kuhn in his declaratory judgment action was that Section 513 of the Illinois Marriage and Dissolution of Marriage Act was constitutionally defective in that it violated his rights to equal protection of the laws, and the rights of substantive due process, and family privacy which are protected by the federal and Illinois constitutions.

After extensive briefing, the trial court in a Memorandum Decision filed September 11, 1990 denied the declaratory relief sought and upheld the constitutionality of Section 513. On September 17, 1990 an order was entered in the trial court confirming the Memorandum Decision. By its terms, the order barred Michael J. Kuhn from taking an immediate appeal until his ex-wife's Petition seeking college expense contributions was adjudicated. On December 6, 1990 a short evidentiary hearing was held to determine the parties' respective responsibilities for the expenses associated with their daughter Nancy's pursuit of a college education at Northern Illinois University. At the conclusion of the hearing, the trial court entered an order holding each parent responsible for fifty percent (50%) of their daughter's college expenses. As the first three semesters of their daughter's schooling had already

passed, Michael J. Kuhn was further ordered to reimburse Gloria Kuhn for fifty percent (50%) of these past college expenses.

Michael J. Kuhn and Gloria Kuhn were married on June 22, 1968. Three children were born to the parties: Steven, now age 22; Nancy, now age 20; and Adam, now age 13. Their marriage was dissolved on February 14, 1984 in Lake County, Illinois. Neither party has remarried. Steven and Nancy are emancipated adults. Steven has been employed since graduating from high school, and has pursued junior college on his own without assistance from his parents. Nancy has chosen to pursue a full time post-secondary school education at Northern Illinois University. She is now in her junior year. Her intended field of study is unknown. During her school vacation periods, she resides with her mother, Gloria Kuhn. The parties youngest child, Adam, resides full time with his mother and brother Steven. Both parents are able bodied persons who are employed full time. In addition to their respective incomes, each has acquired property and wealth, either from the original judgment decree or through acquisitions, savings and/or investments. The parties never discussed any possible college pursuit by their children at the time of their marriage dissolution, nor was any college expense apportionment agreement ever entered into by the parties subsequent thereto.

A Notice of Appeal was filed on December 10, 1990 to review the trial court's decisions of September 11, 1990; September 17, 1990; and December 6, 1990. The Notice of Appeal describes Michael J. Kuhn's constitutional objections to Section 513 as well as an objection to the amount of the college expenses he was ordered to bare.

At the conclusion of the December 6, 1990 hearing, counsel for Michael J. Kuhn asked the Court to stay en-

forcement of its college expense order pending appeal. The motion was denied. Thereafter, Michael J. Kuhn applied to the Illinois Appellate Court and the Illinois Supreme Court for entry of stay orders on just terms to block the enforcement of the trial court's December 6, 1990 order requiring payment of $5,641.57 which represented reimbursement of prior college expenses as well as payment for current college expenses. The Illinois Appellate Court denied the stay request on December 20, 1990. The Supreme Court of Illinois also denied the request for stay shortly thereafter.

On December 27, 1990, Gloria Kuhn petitioned the trial court for an entry of a contempt citation against Michael J. Kuhn for his alleged willful failure to comply with the trial court's order entered on December 6, 1990. A response to the petition was filed on December 27, 1990. A rule to show cause was entered on December 27, 1990. However, the rule was never personally served on Michael J. Kuhn. A hearing on the contempt citation petition was held on January 10, 1991. Michael J. Kuhn objected to the trial court's hearing the contempt petition on the ground that Petitioner failed to personally serve the rule precluded the court from exercising jurisdiction. It was noted by counsel for Michael J. Kuhn that the trial court's own local rules made service of the rule a jurisdictional prerequisite for adjudication of civil contempt petitions. The court held that it had jurisdiction notwithstanding the lack of personal service of the rule, and proceeding to adjudicate the contempt citation.

During the hearing, counsel for Michael J. Kuhn indicated to the trial court that no disrespect of any kind was intended by Michael J. Kuhn in his delayed compliance with the previous court order of December 6, 1990. He was present in court on January 10, 1991 with a check

payable to Gloria Kuhn in the amount of $5,641.57 to satisfy the previously adjudicated obligation. Payment had been delayed while Michael J. Kuhn lawfully sought stays of the order from the Illinois Appellate Court and the Supreme Court of Illinois. Such stays were sought because the trial court had denied a request made on December 6, 1990 to stay the college expense payment order pending appeal. The trial court was informed on January 10, 1991 that Michael J. Kuhn had effectively exhausted all legal avenues available to him to seek a stay, and as such was prepared to pay the sums due under the order to Gloria Kuhn. The monies due were in fact paid in open court.

Based on the foregoing, counsel for Michael J. Kuhn argued that no willful disobedience had been proven, and as such Michael J. Kuhn should not be held in contempt. Counsel for Gloria Kuhn opposed the position, arguing that the contempt finding was necessary to protect his client's right to pursue attorneys fees and costs associated with the contempt proceeding. The trial court then adjudicated Michael J. Kuhn in contempt and discharged such finding instanter upon the payment of $5,641.57. Gloria Kuhn was granted leave to file a Petition for Attorneys Fees incurred in conjunction with the contempt proceeding. A hearing was set for February 5, 1991 to adjudicate the petition, if one was filed.

Michael J. Kuhn filed his second Notice of Appeal on January 14, 1991 to appeal the contempt finding made on January 10, 1991. An order allowing consolidation of the two appeals was entered by the Illinois Appellate Court on February 13, 1991.

Gloria Kuhn filed her Petition for Attorneys Fees on February 5, 1991. Michael J. Kuhn had previously filed a Response to Petition for Attorneys Fees on February

4, 1991 since a copy of the petition had been provided to counsel prior to its filing. Michael J. Kuhn raised a jurisdictional challenge to the trial court's consideration of the Petition for Attorneys Fees in his response. He took the position that the filing of the second Notice of Appeal on January 14, 1991 precluded the trial court from any further consideration of matters pertaining to the contempt citation, including a subsequent award of attorneys fees.

On February 5, 1991, the trial court began a hearing on the Petition for Attorneys Fees. No ruling on the Petition was made. The trial court took the jurisdictional objection of Michael J. Kuhn under advisement, and continued the matter for hearing and decision on February 26, 1991. At the subsequent hearing, the trial court denied the jurisdictional objection and proceeded to enter an award of attorneys fees in favor of Gloria Kuhn in the sum of $1,156.25. The trial court provided in its order that enforcement of the attorney fee award would be stayed upon the filing of an appeal bond in the sum of $1,734.38. The Appeal Bond was filed and approved by the trial court on March 12, 1991.

Michael J. Kuhn filed his third Notice of Appeal on February 27, 1991 to seek review of the trial court's February 26, 1991 order which he claimed was void for want of jurisdiction. An order allowing the consolidation of the third appeal with the previous consolidated cases was entered by the Illinois Appellate Court on March 14, 1991.

On October 21, 1991, the Illinois Appellate Court, Second District affirmed the trial court's order apportioning the payment of college expenses, denied Michael J. Kuhn's constitutional to Section 513, reversed the finding of contempt, and vacated the order awarding Gloria Kuhn attorneys fees.

On February 5, 1992 the Supreme Court of Illinois, in the exercise of its jurisdiction, denied a timely filed Petition for Leave to Appeal which is the method by which discretionary review sought by litigants in Illinois.

Pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, a Petition for a Writ of Certiorari seeking review in this cause is to be filed with the Clerk of the Supreme Court on May 5, 1992.

ARGUMENT

This case presents a challenge to a previous holding of the Illinois Supreme Court wherein Section 513 of the Illinois Marriage and Dissolution of Marriage Act was held not to violate the equal protection clauses of the federal and Illinois constitutions. *Kujawinski v. Kujawinski*, 17 Ill.Dec. 801, 71 Ill.2d 563 (1978).

As more fully developed below, Appellant does establish a significant constitutional defect in Section 513 which fairly calls into question the constitutionality of the statute in light of other competent authority from other states which have held that equal protection prohibits the compelling of divorced parents to make college expense payments when no such authority exists to compel non-divorced parents to make similar contributions. Further, Appellant has raised a second constitutional issue not considered in *Kujawinski*. Section 513, as enacted and applied in practice, violates Appellant's substantive due process rights which have been held to guarantee his right to raise and educate his children free from state interference.

The Illinois Appellate Court, Second District declined to consider any challenge to equal protection argument made in this case because of the Court's decision in *Kujawinski*. However, the Illinois Appellate Court did dis-

cuss the substantive due process challenge in its opinion. The Illinois Appellate Court compared Section 513 to other provisions of the Act such as custody, child support and visitation rights. The issues of custody, child support and visitation rights however deal with the state's compelling interest in protecting and providing for **minor children** of divorced parents during the children's minority. Section 513 deals with the education expenses of the **adult** children of divorced parents. There is no compelling state interest in post-secondary education of adult children of either married or divorced parents.

(a.)

Permissible State Discrimination

The Equal Protection Clauses of both the U.S. Constitution (14th Amendment) and the Illinois Constitution are intended to protect persons from the dangers inherent in unreasonable state sponsored classification systems. U.S. Const., Amend. XIV. Ill.Const. Art. I Sec. 2.

Equal protection requires that similarly situated persons be governed by the same rule of law in like circumstances. Classification systems which make distinctions based upon race, residency, alienage, or which impair fundamental rights such as the ability to cast a meaningful election ballot are not favored and presumed unconstitutional. Such classification systems are judged under a "strict judicial scrutiny" test wherein the burden lies on the state to justify the need to engage in such discrimination to further a legitimate state interest. *Graham v. Richardson,* 403 U.S. 365 (1971); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Baker v. Carr,* 369 U.S. 186 (1962).

Other classification systems which cause state sponsored discrimination are not subject to strict judicial scrutiny

and are presumed to be constitutionally permissible legislative actions *if* (a.) the purpose of the legislation is one properly the subject of legislative concern, and (b.) the classification system created by the legislature bears a rational relationship to the legitimate legislative concern. A legislative classification system which causes discriminatory treatment must have a substantial tie to an important state interest to pass constitutional scrutiny. Michael J. Kuhn herein concedes that the rational relationship test is the proper measure of the constitutionality of Section 513 against an equal protection challenge. However, such a concession does not cure the inherent constitutional defects contained in Section 513.

(b.)

Section 513 does create a Legislative Scheme of Discriminatory Classification

Section 513 does in fact create a legislative classification system solely based upon marital status. Individuals who are parents of college age students can be compelled to finance the cost of such an education if

(1) the parents of the college student are no longer married to each other, or

(2) the parents of the college student never married.

Ill.Rev.Stat., Ch. 40, Sec. 513. *Rawles v. Hartman*, 123 Ill.Dec. 217, 172 Ill.App.3d 931 (2nd Dist., 1988).

No similar statutory scheme exists in Illinois to compel financial assistance from parents who *are married to each other* to support the college endeavors of adult children born of their marriage. The Supreme Court in *Kujawinski v. Kujawinski*, 17 Ill.Dec. 801, 71 Ill.2d 563 (1978) refused to consider whether the Illinois Family Ex-

pense Statute creates such an obligation. However, a subsequent Appellate Court has ruled that all parental liability for a child's expenses under the Illinois Family Expense Statute *ends* when such child reaches the age of majority, even if the child remains dependent on his parents. *Tully v. Cuddy*, 94 Ill.Dec. 218, 139 Ill.App.3d 697 (1st Dist., 1985). Nor does any common law obligation exist to provide specific financial support beyond the age of majority to fund college pursuits. Prior to the age of majority, Illinois has uniformly obligated parents to support their children, whether legitimate or illegitimate, and regardless of marital status. From birth through age 18, parents are uniformly burdened without distinction or classification to make financial provisions for the welfare of their children. *See*, Illinois Family Expense Statute, Ill. Rev.Stat., Ch. 40, Sec. 1015; Illinois Marriage and Dissolution of Marriage Act, Ill.Rev.Stat., Ch. 40, Secs. 501, 505; Illinois Parentage Act, Ill.Rev.Stat. Ch. 40, Sec. 2501, *et seq.*

The uniform system of obligations breaks down at majority. Parents who fall outside of the class of persons subject to Section 513 actions are free to reject any and all requests from their emancipated children who seek to pursue a post-secondary education. Some parents simply cannot afford to provide such financial assistance. Many parents do not want to make financial sacrifices and lifestyle adjustments which may accompany the payment of college tuition bills, housing bills and other college expenses. Many parents may not have the financial means to support their other minor children when one of their children reaches college-age and desires a post-secondary degree. Some parents, though having the means to provide financial support, simply reject requests for college expenses from their emancipated children for various reasons including philosophical objections to higher education,

disagreement with the choice of school or career, a desire to see if their adult child can "make it" on his or her own, a desire to educate their children as to the value of money or earning money to reach certain goals, or a belief that parenting ends at age 18. For whatever reason, parents not subject to Section 513 can refuse to pay college expenses with impunity as there is no common law or statutory provision which requires all parents to pay for their children's higher education expenses.

Parents who are no longer married or who were never married to each other are deprived of the ability to make choices which are available to married parents. Those choices and decisions relate to a parent's fundamental right to raise his or her children. A parent's fundamental right to make decisions in regard to raising his or her child has been subverted by legislative edict that compels certain parents to finance the education of their emancipated children regardless of the parent's individual desires, wishes or beliefs.

(c.)

No Rational Justification exists to support the Discriminatory Classification Scheme of Section 513

The underlying purpose of Section 513 has never been stated by the Illinois General Assembly. The legislature has never specifically discussed why Section 513 was enacted or what purpose Section 513 was intended to serve. No counterpart exists in the Uniform Marriage and Divorce Act (1970 Act, amended 1971 and 1973) to compel the payment of college expenses. *See, Uniform Laws Annotated,* Vol. 9A, Master Edition, West Publishing Co., 1987. The Historical Practice Notes indicate that the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat., Ch.

40, Sec. 101, *et seq.*) was principally modeled after the Uniform Marriage and Divorce Act.

The absence of a college expense provision in the Uniform Marriage and Divorce Act is consistent with the generally recognized and accepted legal principal that the financial obligations of parenthood *end* at the age of majority. *Tully v. Cuddy*, 139 Ill.App.3d 697, 94 Ill.Dec. 218 (1st Dist. 1985). *See also, Grapin v. Grapin*, 450 So.2d 853 (Fla. 1984); *Maas v. Maas*, 440 So.2d 494 (Fla. App. 2nd Dist. 1983); *Green v. Green*, 432 So.2d 959 (La. App. 4th Cir., 1983). As noted by the Florida Supreme Court in *Grapin:*

> *While most parents willingly assist their adult children in obtaining a higher education that is increasingly necessary in today's fast-changing world, any duty to do so is a moral rather than a legal one. Parents who remain married while their children attend college may continue supporting their children even beyond age twenty-one but such support may be conditional or may be withdrawn at any time, and no one may bring an action to enforce continued payments. It would be fundamentally unfair for courts to enforce these moral obligations of support only against divorced parents while other parents may do as they choose. As Judge Cowart pointed out in his dissent to a decision affirming a post-majority support order for a high school student:*
>
> *It denies such divorced parents their constitutional right to equal treatment under law, that being the same right to voluntarily make such decisions concerning their adult children as other divorced parents have under law. I cannot agree with a rule of law that permits domestic relations judges to create and enforce special duties of support in favor of adult children against divorced parents which are not provided by general law equally applicable to all parents*

Owens v. Owens, 415 So. 2d 855, 858 (Fla. 5th DCA 1982) (Cowart, J. dissenting).

Grapin, 450 So.2d at 854.

A voluntary decision by an emancipated child to attend college does not trigger ***any*** corresponding obligation on the child's parents to support such an endeavor. *In Re The Marriage of Plummer*, 735 P.2d 165 (Colo. 1987); *In Re The Marriage of Pring*, 742 P.2d 343 (Colo. App. 1967); *Atwood v. Atwood*, 643 S.W.2d 263 (Ky. App. 1982). Though sympathizing with a request for college expense assistance for an emancipated student, the request must be rejected as all legal duty of support terminates upon reaching the age of majority. *Atwood*, 643 S.W.2d at 266-267. *In accord, Miller v. Miller*, 459 S.W.2d 81 (Ky.App.Ct., 1970); *Demarie v. Demarie*, 295 So.2d 229 (La.App.Ct., 1974); *Spence v. Spence*, 266 A.2d 29 (DC Ct. of Appeals, 1970); *Riegler v. Riegler*, 532 S.W.2d 734 (Ark., 1976); *Carlson v. Carlson*, 584 P.2d 864 (Utah, 1978); *Peterson v. Peterson*, 319 N.W.2d 414 (Minn., 1982); *Dowling v. Dowling*, 679 P.2d 480 (Alaska, 1984); *Appelbe v. Appelbe*, 75 N.C. App. 197, 330 S.E.2d 57 (N.C.App.Ct., 1985); *Litel v. Litel*, 490 So.2d 741 (La.App.Ct., 3rd Cir., 1986); *The Marriage of Linberg*, 462 N.W.2d 698 (Iowa App.Ct., 1990); *Breslaw v. Breslaw*, 548 N.Y.S.2d 815 (App.Div. 2nd Dept., 1989); *Ashley v. Malinski*, 398 N.Y.S.2d 253, 91 Misc.2d 575 (Family Ct., Albany Co., 1977).

Illinois has attempted to alter this generally accepted principle by carving out an exception to burden a special class of individuals to fund a noble cause which is neither a federally protected fundamental right nor a right existing under state law.

Education, though important, is not a right in need of special protection in Illinois. The state constitution man-

dates that the government provide free, quality elementary and secondary education. Ill. Const. Art. X, sec. 1 (1970). No constitutional obligation exists to provide *any* state sponsored post-secondary education. Nor does any state statute confer any special right to obtain post-secondary education. The pursuit of a college education is a privilege, not a right. To exercise the privilege, one must possess both the requisite degree of academic skill to win a seat in a college class, and the requisite financial means to pay the costs associated with such a pursuit, i.e. tuition, room and board, book fees, and the like. Many promising students who otherwise possess the academic skills to enroll in college will never be able to realize the pursuit due to lack of financial resources.

This inherent inequity in the availability of college education does not rationally justify the imposition of extraordinary financial burdens upon the shoulders of a select group of persons who have been singled out on the basis of their marital status while other parents of college age students escape these legal burdens merely because they are married. Michael J. Kuhn is arguing that it is constitutionally improper to create a legislative scheme of classification and discrimination to support a noble idea (pursuit of college and/or other post-high school education) when no actual right exists to be protected. If he and his ex-wife were still married, neither could sue or otherwise compel the other to support their children's college endeavors.

Further compounding the irrationality inherent in Section 513 which relies on marital status as the basis for discrimination, the intended beneficiaries of the statute, being the emancipated children of non-married parents who desire to further their education have no legal standing to compel their parents to provide financial support.

Miller v. Miller, 112 Ill.Dec. 191, 160 Ill.App.3rd 354 (3rd Dist., 1987). *Garrison v. Garrison*, 54 Ill.Dec. 653, 99 Ill. App.3d 717 (2nd Dist., 1981). So long as non-married parents of college age students agree amongst themselves to jointly withhold financial assistance, or otherwise refuse to initiate a Section 513 action, the Act is ineffective.

Section 513 does not promote a legitimate legislative interest. No right to attend college exists. Post-secondary education is a privilege which may or may not be available to a given person for a host of reasons. Even if legislation was fashioned to guarantee a college education to ***all*** students of requisite academic skill, the classification system of Section 513 is not a rational means by which to achieve the objective. Section 513, as enacted and as applied in practice, violates Defendant's constitutional guarantee of equal protection under the law as set forth in the federal constitution. U.S. Const. Amend. XIV.

(d.)

Section 513 Violates Petitioner's Substantive Due Process Rights

The First, Ninth, and Fourteenth Amendments protect a wide range of fundamental rights and liberties from government intrusion or impairment. U.S. Const. Amend. I, IX, XIV. The right to educate one's children as one chooses has been made applicable to the States. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The right to marry, establish a home and bring up children are also protected against state interference. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The right to direct the upbringing and education of children by parents has been held to be a fundamental right. *Griswold v. Connecticut*, 381 U.S. 479 (1965). As Justice White wrote, "*These decisions affirm that there is a realm of family life which the state*

cannot enter without substantial justification." *Griswold*, 381 U.S. at 502-503, citing *Prince v. Mass*, 321 U.S. 158 (1944). Justice Goldberg noted in the opinion, "*The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.*" *Griswold*, 381 U.S. at 495.

The parental decision making process regarding education and upbringing of children has been upheld as a fundamental right which is protected from unwarranted governmental intrusion. "*Where there is a significant encroachment upon personal liberty, the State may prevail only upon a showing of a subordinating interest which is compelling.*" *Griswold*, 381 U.S. at 504. If a statute is not reasonably necessary for the effectuation of a legitimate, substantial and compelling state interest, or is arbitrary and/or capricious in its application, the law is invalid under the Due Process Clause. *Id.*

Education is not afforded protection under the Federal Constitution as "education" is not a fundamental Constitutional right. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Illinois Constitution does not establish a right to higher education. Ill. Const. Art. X, Sec. 1 (1970). The express goal of state education is to develop all persons to the limits of their capacities through public educational institutions with the State having the primary responsibility for financing the system of public elementary and secondary education. *Id.* The Illinois Constitution does not impose a burden upon the State, any agency, nor any individual for the payment of a person's post-secondary education expenses.

There is no constitutional or statutory duty placed upon parents in general to pay for their child's college expenses.

Any decision relating to college or post-secondary education is specifically reserved to parental discretion. A parent's decision not to contribute to a child's educational expenses does not foreclose the child from work, scholarship, or educational loans in pursuit of a degree.

Section 513 of the Marriage and Dissolution of Marriage Act is a significant encroachment upon a parent's fundamental rights, liberties, and choices regarding the upbringing, and education of their children.

The State cannot claim that it has a compelling interest at stake to which Section 513 addresses or corrects. Education is not a fundamental right. The Illinois Constitution does not create an individual right to a post-secondary education. A child of non-married parents has no right to a higher education. No child has a right to compel his parents to support him after age 18. Ill.Rev.Stat., Ch. 40, Sec. 1015. There is no articulated purpose in the statute which attempts to place the class of "divorced" children on an equal legal footing with non-divorced children regarding college expenses since non-divorced children have no legal right to compel their parents to contribute to their college expenses. It is a question of individual choice whether a parent will pay for college expenses. There is no "right or wrong" parental decision in this area. One family's decision does not and should not control what another family should do. It is a moral choice.

Section 513 does not advance any compelling state interest. It is an arbitrary and capricious intrusion into the realm of fundamental parental rights. Therefore, Section 513 constitutes unconstitutional legislation under the Due Process Clause of the federal constitution. U.S. Const. Amend. XIV.

CONCLUSION

For all of the reasons set forth above, Petitioner does hereby seek the issuance of a Writ of Certiorari to the Appellate Court of Illinois.

Respectfully submitted,

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Attorneys for Petitioner

Dated: May 4, 1992

APPENDIX

[FILED OCTOBER 21, 1991]

Nos. 2-90-1375, 2-91-0078 & 2-91-0256, cons.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re MARRIAGE OF GLORIA KUHN,

Petitioner-Appellee,

and

MICHAEL J. KUHN,

Respondent-Appellant.

Appeal from the Circuit Court of Lake County.
No. 83-D-1216
Honorable Harry D. Hartel, Jr., and
Honorable Jane D. Waller, Judges, Presiding.

JUSTICE McLAREN delivered the opinion of the court:

In this consolidated appeal, respondent appeals from orders of the trial court that: (1) denied him a declaratory judgment; (2) held him responsible for 50% of his daughter's colleges expenses; (3) held him in contempt of court; and (4) awarded petitioner attorney fees for the contempt proceedings. We affirm in part, reverse in part, and vacate in part.

The marriage of Michael and Gloria Kuhn was dissolved in 1984. One of the children of their union, Nancy, began to attend Northern Illinois University in the fall of 1989.

In May 1990, Gloria brought a petition seeking college expense contributions from Michael pursuant to section 513 of the Illinois Marriage and Dissolution of Marriage Act (Act) (Ill. Rev. Stat. 1989, ch. 40, par. 513). Michael then filed a petition for declaratory relief which challenged the constitutionality of section 513. The trial court upheld the constitutionality of that section and denied Michael's petition. On December 6, 1990, the court entered an order holding each parent responsible for 50% of Nancy's college expenses and ordering Michael to reimburse Gloria within 10 days for 50% of past college expenses. A notice of appeal from those orders was filed.

Michael moved to stay enforcement of the college expense order pending appeal. The trial court denied the motion. Subsequent requests to this court and our supreme court for stay orders were denied. During the pendency of Michael's petition to the supreme court, Gloria petitioned the trial court for entry of a contempt citation against Michael for his failure to reimburse Gloria for past college expenses pursuant to the court's order. A rule to show cause was entered, and, after a hearing, Michael was adjudicated in contempt. Michael was then discharged following his payment to Gloria that day in open court. Michael appealed the finding of contempt.

Gloria next filed a petition for attorney fees incurred in conjunction with the contempt proceeding. The court awarded fees of $1,156.25 in Gloria's favor. The enforcement of this award was stayed by the trial court upon the filing of an appeal bond. Michael then appealed from the award. All three appeals were then consolidated by this court.

Michael first contends that section 513 of the Act, pursuant to which he was ordered to pay 50% of Nancy's college education, is unconstitutional in that it violates the

equal protection and due process clauses of the Federal and Illinois Constitutions. The issue of whether section 513 violates the equal protection clauses has previously been decided in the negative by our supreme court in *Kujawinski v. Kujawinski* (1978), 71 Ill. 2d 563. Michael's challenge of that holding is misplaced; only the supreme court can overrule or modify its opinions, and we are bound to follow the supreme court's decisions. (See *Agricultural Transportation Association v. Carpentier* (1953), 2 Ill. 2d 19, 27; *People v. Condon* (1990), 195 Ill. App. 3d 815, 824.) We, therefore, will not consider this challenge of our supreme court's decision.

Michael's contention that section 513 violates his right to substantive due process also fails. Michael argues that the right to raise one's children as one sees fit is a fundamental right and that any encroachment in this area by the legislature must be propelled by a "legitimate, substantial and compelling state interest." According to Michael, section 513 advances no compelling State interest and is therefore an unconstitutional encroachment. We disagree.

The purpose of section 513 is to "furnish a means to provide for the education of children of divorced parents." (*In re Marriage of Treacy* (1990), 204 Ill. App. 3d 282, 286.) This section is one among may contained in the Act, the purpose of which is to protect the interests of children whose parents have decided to dissolve their marriages. It is self-evident from the provisions of the Act, from the issue of custody addressed in sections 601 through 611 (Ill. Rev. Stat. 1989, ch. 40, pars. 601 through 611), through the issue of support in section 513 (Ill. Rev. Stat. 1989, ch. 40, par. 513), to the issue of visitation covered in section 607 (Ill. Rev. Stat. 1989, ch. 40, par. 607) that the State has a compelling interest in protecting and providing for the children of divorced parents. In addition, section

513 does not mandate divorced parents to provide funds for their children's post-secondary education; a determination as to whether a parent shall contribute is left to the sound discretion of the trial court. (*Treacy*, 204 Ill. App. 3d at 286.) Even then, a child cannot force his parents to provide funds if both parents agree that such funds will not be provided. Section 513 advances a compelling State interest without encroaching upon any fundamental right; its enforcement is therefore not unconstitutional.

We next consider Michael's contention that the court improperly held him in contempt. The contempt citation was issued because Michael did not pay to Gloria within 10 days the money owed for Nancy's previous college expenses. Michael did not pay the amount due until he had exhausted his attempts to obtain a stay of the trial court's order from this court and our supreme court. Michael now argues that he should not have been held in contempt for pursuing legal remedies to which he may have been entitled. We agree.

A trial court's issuance of a contempt citation will not be reversed on appeal unless the court has abused its discretion. (*Central Production Credit Association v. Kruse* (1987), 156 Ill. App. 3d 526, 531.) However, the power to impose contempt is subject to limitations, and it should only be exercised in extreme situations. (*Central Production*, 156 Ill. App. 3d at 531.) While Michael did not pay Gloria within the period ordered by the court, the finding of contempt was too harsh a penalty under the circumstances. Michael's failure to pay, while willful and intentional, was not done to show any disrespect to the court; Michael was merely seeking temporary appellate relief from the effects of the court's order. The rule to show cause should have been filed after a stay was denied by the reviewing courts and a demand for payment was

made. Michael's tender of the amount due at the next court date is evidence of a lack of malice on his part. We conclude that the contempt finding was not warranted under these circumstances and so reverse the court's citation as an abuse of discretion.

Because of our reversal of Michael's contempt citation, we must also vacate the attorney fees awarded to Gloria for representation in the contempt proceedings. Similarly, we need not address Michael's contentions that he was not properly served with the rule to show cause or that the court lacked jurisdiction to adjudicate Gloria's petition for attorney fees.

Michael finally contends that the court's apportionment of Nancy's college expenses was an abuse of discretion. All that Michael provides is the monthly incomes and net worths of Michael and Gloria plus the fact that Nancy was not ordered to contribute anything towards her own expenses. On the basis of this limited argument, we cannot conclude that the court abused its discretion in its order of apportionment.

For these reasons, the orders of the circuit court of Lake County apportioning payment of the college expenses and denying Michael declaratory relief are affirmed; the order finding Michael in contempt of court is reversed; and the order awarding Gloria attorney fees is vacated.

Affirmed in part; reversed in part; and vacated in part.

BOWMAN and INGLIS, JJ., concur.

[Certificate of Clerk omitted in printing.]

(Letterhead Of)

STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT

Appeal from the Circuit Court of County of Lake

Trial Court Number: 83D1216

THE COURT HAS THIS DAY, 12/04/91, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-90-1375
Cons. Cases: 2-91-0078, 2-91-0256
IRMO: Kuhn, Gloria & Michael J.

Upon consideration by the court, Petition of Certificate of Importance filed by defendant-appellant, is hereby denied (McLaren, Bowman, Inglis, JJJ.)

LOREN J. STROTZ, Clerk

cc: Jerome W. Pinderski, Jr.
Paul C. Pinderski
Mr. Joel S. Miller
Mark W. Kelly

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

February 5, 1992

Mr. Jerome W. Pinderski, Jr.
Pinderski & Oinderski
115 West Colfax
Palatine, Ill. 60067

No. 72888—Gloria Kuhn, respondent, v. Michael J. Kuhn, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1992.

STATE OF ILLINOIS
COUNTY OF LAKE—SS

[FILED SEPTEMBER 17, 1990]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

GEN. NO. 83 D 1216

IN RE: THE MARRIAGE OF GLORIA J. KUHN,

Plaintiff,

vs.

MICHAEL J. KUHN,

Defendant.

ORDER

This matter coming on to be heard on Defendant's Petition for Declaratory Judgment regarding the constitutionality of Section 513 of the Illinois Marriage and Dissolution of Marriage Act, the parties having fully briefed the issues and the Court having reviewed the pleadings and being fully advised in the premises;

IT IS HEREBY ORDERED that

A) Defendant's Petition for Declaratory Judgment is denied;

B) Plaintiff's Petition for Relief under Section 513 remains pending before this Court.

Dated at Waukegan, Illinois this
17th day of Sept. 1990.

ENTER: /s/ TERRENCE J. BRADY
Judge

STATE OF ILLINOIS
COUNTY OF LAKE—SS

[FILED SEPTEMBER 11, 1990]

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

NO. 83 D 1216

IN RE: THE MARRIAGE OF GLORIA J. KUHN,

Plaintiff,

vs.

MICHAEL J. KUHN,

Defendant.

MEMORANDUM OPINION

The single legal issue presented in this cause is whether § 513 of the IMDMA, Ch. 40, is unconstitutional. By *stare decisis* of the Supreme Court's ruling in *Kujawniski v. Kujawniski*, 71 Ill. 2d 563 (1978), which upheld the constitutionality of § 513, the prime issue raised here, this trial court cannot and will not declare § 513 unconstitutional.

The trial court could extend its reasoning, but will not. Rather, it must be emphasized that this court has read and considered all pleadings, briefs, and authorities as submitted by both sides. Notably, this court adopts the reasoning and arguments as set forth in plaintiff, Gloria Kuhn's brief, at pages six through eleven, together with the *Kujawniski* case which is dispositive of the issue raised in the case at bar. *Kujawniski*, at p. 580-582.

Having so ruled, this Court will enter an order denying all of defendant's prayers for relief, all of which essentially seek declaration of unconstitutionality of § 513, in the form of declaratory judgment.

Counsel will tender an order accordingly, for entry on September 19, 1990. Entry of that order will render this Court's action final for purposes of enforcement and appeal. However, should plaintiff Gloria Kuhn seek determination of substantive factual 513 issues, this cause would not be final for purposes of enforcement or appeal, until complete resolution of all such issues.

ENTER:

/s/ TERRENCE J. BRADY
Associate Judge

Dated in Waukegan, Illinois
this ____ day of September, 1990.